Supreme Court, U.S.
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No. 00-0476

In The

Supreme Court of the United States

ALACOQUE B. COLETTE KELLY,

Petitioner,

vs.

METHODIST HOSPITAL OF SOUTHERN CALIFORNIA, ELLEN BLACKSTOCK and DOES 1 through 20, inclusive,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

Confining itself to construing a California statute that has since been amended, the California Supreme Court held that respondent Methodist Hospital was a religious entity within the meaning of the state's Fair Employment and Housing Act's ("FEHA") former blanket exemption for nonprofit religious corporations and associations. The Court expressly declined to address any of petitioner's present constitutional challenges to the statute because she did not timely raise them below. As the California Legislature modified and restricted the exemption at issue while the case was pending, the Court's decision has limited application and is of little significance to anyone beyond the parties to this action.

Certiorari is wholly inappropriate here because: (1) The constitutional issues that are the focus of the petition were neither properly raised nor decided below; (2) the decision has limited precedential value since the operative statute has been modified; and (3) the decision – doing no more than construing the intended reach of a state remedial statute – is proper on the merits and has no federal constitutional implications. In short, petitioner has failed to make a "federal case" out of what was and always has been a state-law dispute about proper statutory construction, a dispute properly and finally resolved by California's highest court. For these reasons, respondent Methodist Hospital respectfully urges this Court to deny the Petition for Writ of Certiorari.

I.

PETITIONER DID NOT TIMELY PRESENT, NOR DID THE DECISION BELOW ADDRESS, THE CONSTITUTIONAL ISSUES RAISED IN THE PETITION.

One of this Court's fundamental precepts is that it will not review constitutional issues that were not timely raised below. This precept is especially compelling as a matter of comity where a state's highest court has never been afforded the opportunity to construe that state's statutes in light of constitutional challenges. Petitioner here did not timely raise her constitutional challenges and the California appellate courts, therefore, properly did not address them.

Petitioner pleaded a state common-law, public-policy claim for age discrimination against Methodist Hospital after she was discharged because she failed to return to work at the expiration of an extended medical leave. (App. 3a.) Under governing California law no such state law claim lies against an employer who is exempt from FEHA. *Jennings v. Marralle*, 8 Cal. 4th 121, 135-36, 32 Cal. Rptr. 2d 275, 876 P. 2d 1074 (1994). Her complaint made no mention of any federal issue.

Methodist Hospital successfully moved for summary judgment on the ground that it was exempt from FEHA. Petitioner raised *no* federal issue in the trial court. (App. 54a-67a.)

The California Court of Appeal affirmed the judgment. (App. 3a-6a.) Petitioner's first reference to any federal statute appeared in her reply brief in the Court of Appeal, where she argued that the Age Discrimination in

Employment Act ("ADEA"), 29 U.S.C. § 621, et seq., and Title VII, 42 U.S.C. § 2000e, et seq., preempted FEHA. (App. 45a.) Following longstanding California procedural rules, the Court of Appeal declined to entertain these arguments because petitioner failed to raise them in her opening brief. (App. 45a-46a.) *See, e.g., REO Broadcasting Consultants v. Martin*, 69 Cal. App. 4th 489, 500, 81 Cal. Rptr. 2d 639 (1999). In her petition for rehearing before the Court of Appeal, petitioner for the first time challenged California Government Code section 12926(d) on constitutional grounds. (App. 98a-101a.) Again, the Court of Appeal declined to consider any new arguments and denied the petition. (App. 71a-73a.) *See, e.g.*, Cal. R. Ct. 29(b)(1); *Conservatorship of Susan T.*, 8 Cal. 4th 1005, 1013, 36 Cal. Rptr. 2d 40, 884 P. 2d 988 (1994).

Petitioner renewed the issues she first raised in her appellate reply and rehearing briefs and raised additional new constitutional and other federal issues in her petition for review before the California Supreme Court. (App. 102a-106a.) Although initially not limiting the issues before it (App. 107a), that court later determined that it would not review any of petitioner's constitutional claims in light of the untimely manner in which petitioner had raised those issues. *See* Cal. R. Ct. 29.2(a) (California Supreme Court may limit issues that it will decide on review). Prior to oral argument, the court advised the parties that "[i]n light of the manner in which this case was litigated before the lower courts, the Court does not expect the parties to address the constitutional validity of section 12926, subdivision (d)(1), at that session." (App. 121a.)

Thus, the sole question before the California Supreme Court was whether Methodist Hospital – a nonprofit institution governed by the Methodist Church – fell within the statutory definition of a nonprofit "religious association or corporation" specifically exempted from FEHA, California Government Code section 12926(d). Relying on the applicable California legislative history, the court concluded that Methodist "Hospital qualifies as a 'religious association or corporation not organized for private profit' as that category was likely understood by the 1959 Legislature that first crafted the applicable version of the religious-entity exemption (now § 12926, subd. (d))." (App. 27a.)

The court reiterated "[b]ecause [the] arguments [concerning the constitutionality of the religious-entity exemption] were not properly preserved in the lower courts, we do not address them." (App. 2a n.3.) *See, e.g.*, Cal. R. Ct. 29(b)(1); *People v. Bransford*, 8 Cal. 4th 885, 893 n.10, 35 Cal. Rptr. 2d 613, 884 P. 2d 70 (1994); *People v. Cookson*, 54 Cal. 3d 1091, 1100, 2 Cal. Rptr. 176, 820 P. 2d 278 (1991). The California Supreme Court's decision, thus, hinged solely on principles of statutory construction and never once even considered petitioner's late-raised constitutional arguments. (App. 1a-29a.)

Petitioner's federal and constitutional concerns were first raised in an appellate reply brief, in an appellate rehearing petition, and in her petition for review to the California Supreme Court. Under established California procedure, the California appellate courts properly declined to address those issues. Petitioner's failure timely to raise any constitutional or other federal arguments – coupled with the California Supreme Court's

well-founded declination to address those late-raised issues – is reason alone to deny the petition. *E.g., Michigan v. Tyler*, 436 U.S. 499, 512 n.7, 98 S. Ct. 1942, 1951 n.7, 56 L. Ed. 2d 486 (1978) ("[f]ailure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court"); *Street v. New York*, 394 U.S. 576, 582, 89 S. Ct. 1354, 1360, 22 L. Ed. 2d 572 (1969) ("this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary").

II.

IN LIGHT OF RECENT AMENDMENTS TO THE CHALLENGED STATUTE, THIS CASE DOES NOT HAVE FAR-REACHING IMPLICATIONS.

Even if petitioner had timely raised her constitutional arguments, this is not the proper case in which to resolve them. While this case was pending before the California Supreme Court, the Legislature substantially amended California Government Code section 12926(d), restricting the exemption to exclude, and thereby expanding state law to cover, nonprofit health care facilities, such as respondent Methodist Hospital, in most regards. California's FEHA law now limits the exemption of those institutions to the employment of an individual of a particular religion in an executive or pastoral-care position connected with the provision of health care. (App. 1a-2a.) In other words, the current statute would cover Methodist

Hospital with respect to its treatment of employees such as plaintiff.

Although the California Supreme Court's ordinary practice is to avoid issuing opinions concerning superseded statutory language, it decided to resolve this case due to the pendency of several other actions involving construction of the former statute. (App. 2a n.2.) But the pendency of a handful of actions – all within California – does not merit this Court's attention. The State's highest court and its appellate courts are fully equipped to deal with the few remaining cases that will be governed by the former version of Government Code section 12926(d). This Court need not waste its time adjudicating a matter of such limited importance.

III.

THE CALIFORNIA SUPREME COURT'S DECISION IS IN PRECISE ACCORD WITH AUTHORITY FROM THIS COURT.

In an effort to detract from both the untimeliness of her constitutional issues and the circumscribed nature of the decision, petitioner contends that the decision conflicts with authority from this Court as well as others. (Pet. 12-24.) Even assuming for the sake of argument that the federal constitutional issue were timely raised, she is wrong because she misconceives the nature of the California Supreme Court's decision. The California court did not decide that religious institutions always have to be exempted from anti-discrimination statutes or even that it is good public policy to exempt religious institutions from such state statutes. Rather, the issue the California

Supreme Court decided was simply whether the California Legislature intended to extend a remedial state statute to govern the conduct of religious institutions. Put in petitioner's constitutional context, had it been timely raised, the issue would have been whether the California Legislature was constitutionally required to affirmatively extend a remedial anti-discrimination statute to govern religious institutions.

The California Supreme Court undeniably decided, as the court of last resort on the issue, that the California Legislature – for a variety of valid reasons, including not interfering with constitutionally protected religious activities – decided not to extend this one remedial statute to religious entities. Since 1959, the California Legislature had excluded from FEHA's definition of an "[e]mployer" "a religious association or corporation not organized for private profit." (App. 18a.) On the basis of the state statute's legislative history, as well as the exemption's purposeful reference to both associations and corporations, the California Supreme Court concluded that the Legislature did not intend for "courts to attempt to parse out various levels of religious sufficiency among the myriad types of religiously affiliated entities in order to determine when to apply the exemption. . . . " (App. 24a-25a.) The Court therefore determined that the exemption should be construed "as encompassing any entity with colorable religious motivation and substantial bona fide religious affiliations, including [Methodist] Hospital." (App. 25a.)

Contrary to petitioner's suggestion, the California Legislature's choice falls squarely within what this Court has allowed.

First, under any test, exempting nonprofit religious entities from state regulation does not constitute the establishment of religion. (*See* Pet. 12-14, 19-22.) More than a decade ago, *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334-35, 107 S. Ct. 2862, 2867-68, 97 L. Ed. 2d 273 (1987), decided that issue. There, this Court held that exempting a church-run gymnasium from Title VII – a remedial, anti-discrimination law – did not violate the Establishment Clause. *See also Walz v. Tax Comm'n of New York*, 397 U.S. 664, 675, 90 S. Ct. 1409, 1415, 25 L. Ed. 2d 697 (1970) (property tax exemption for real property used exclusively for religious purposes did not violate Establishment Clause).

Second, this case does not even involve the question of whether a claim of religious autonomy constitutionally mandates a judicially-created exemption from laws which prohibit discrimination. (*See* Pet. 14-19.) Rather, this case involves whether a remedial statute that *expressly* does not extend to religious employers constitutionally has to be rewritten to extend where it never was intended to go. Petitioner's citations to cases involving claims under supposed statutory counterparts, such as the National Labor Relations Act ("NLRA"), are inapposite, as the NRLA contains no *statutory* religious-employer exemption. 29 U.S.C. § 152 (1998).

Third, contrary to petitioner's suggestion, limiting the scope of a remedial statute does not violate equal protection. (*See* Pet. 22-24.) Rather, excluding religious organizations from a remedial statute promotes a legitimate purpose: avoiding governmental interference and entanglement with religion. *Corporation of Presiding Bishop v. Amos*, 483 U.S. at 338-39, 107 S. Ct. at 2870; *see also Gay*

Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 491, 156 Cal. Rptr. 14 (1979) (absence of a state law statutory remedy for employment discrimination based on sexual orientation did not deny homosexuals equal protection, because there is "no authority in support of the proposition that a remedial statute which affords a benefit to one or a number of historically aggrieved groups is unconstitutional if the same benefit is not afforded to all historically aggrieved groups").

Finally, there is no support for petitioner's contention that Title VII requires state laws to ban the same conduct that federal law bans. (Pet. 24-27.) *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 290 n.29, 107 S. Ct. 683, 694 n.29, 93 L. Ed. 2d 613 (1987) held that Title VII "pre-empt[s] only those state laws that expressly *sanction* a practice unlawful under Title VII; [it] does not pre-empt state laws that are silent on the practice." This Court rejected the notion that the state "would be required to incorporate every prohibition contained in Title VII into its state law, since it would otherwise be held to 'permit' any employer action it did not expressly prohibit." *Id.* FEHA's religious employer exemption does not sanction or approve any conduct barred under federal law; it is merely silent as to the same conduct violating Title VII. Had plaintiff sought to rely on the protections afforded by Title VII, and had she properly exhausted her administrative remedies under that statutory scheme, she could have brought her claims in federal court in the first place.

The California Supreme Court's decision does not raise any federal constitutional issues. The decision merely construes a remedial statute in accordance with its

plain language and permissible legislative purpose. There is no reason for this Court even to consider certiorari.

CONCLUSION

For the reasons set forth above, there is no reason for this Court to grant certiorari on issues that were not timely raised, will have no effect on the present statutory scheme, and have been long-resolved by this Court's own precedents. The petition should be denied.

Dated: October 27, 2000

Respectfully submitted,

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